No. 347

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

SOCONY-VACUUM OIL COMPANY, INC., ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No.

SOCONY-VACUUM OIL COMPANY, INC.
CONTINENTAL OIL COMPANY
EMPIRE OIL REFINING COMPANY
MID-CONTINENT PETROLEUM CORPORATION
PHILLIPS PETROLEUM COMPANY
SHELL PETROLEUM CORPORATION
SINCLAIR REFINING COMPANY
SKELLY OIL COMPANY
THE GLOBE OIL & REFINING COMPANY (ILLINOIS)
THE GLOBE OIL & REFINING COMPANY (OKLAHOMA)
THE PURE OIL COMPANY
WADHAMS OIL COMPANY

Corporations,

CHARLES E. ARNOTT
H. T. ASHTON
P. E. LAKIN
ROBERT W. McDOWELL
R. H. McELROY, JR.

Individuals,

Petitioners,

v.

UNITED STATES OF AMERICA.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The United States having filed its petition for a writ of certiorari in the above-entitled cause, petitioners severally file this cross-petition praying that a writ of certiorari is-

sue to review the same judgment entered on July 27, 1939, by the United States Circuit Court of Appeals for the Seventh Circuit. That judgment reversed judgments of the United States District Court for the Western District of Wisconsin convicting petitioners under an indictment charging a conspiracy to artificially raise and to fix the tank car spot market price of gasoline in violation of the Sherman Anti-Trust Act.

Opinion Below.

The opinion of the Circuit Court of Appeals, one judge dissenting, has not yet been reported, but may be found at p. 3911 of the record. The opinion of the District Court on motions after verdict (R. 2488), is reported in 23 F. Supp. 937.

Jurisdiction.

The judgment to be reviewed was entered on July 27, 1939 (R. 3953). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 347a), and Rule XI of the Rules of Practice and Procedure, promulgated by this Court on May 7, 1934.

Questions Presented.

1. Whether the indictment charges and the evidence establishes the commission of an overt act adequate to confer jurisdiction upon the United States District Court for the Western District of Wisconsin. One judge below, in a well considered dissent, held that no overt act in Wisconsin was charged or proved.

2. Whether the variance between the indictment and the proof did not constitute a complete failure of proof.

3. Whether the several defendants were entitled to directed verdicts of not guilty, because there was no evidence to show that their acts constituted an unreasonable restraint of trade or commerce.

4. Whether the denial of new trials to petitioners, when such new trials were granted to other defendants, did not violate the constitutional right of petitioners to have the issues determined by a jury, in that the possession of the power to raise or affect market prices arbitrarily was a fundamental issue in this case and the jury never considered nor made any finding on the question whether the petitioners, aside from those defendants granted new trials,[1] possessed such power.

5. Whether the arguments of Government counsel to the jury constituted such an appeal to passion, prejudice and class distinction as to deprive petitioners of a fair and impartial trial.

It is the position of the petitioners that the Circuit Court of Appeals correctly interpreted the Sherman Law, but that for the reasons herein stated the Court erred in failing to direct the trial court to enter judgments of dismissal.

The Circuit Court of Appeals, having decided on other grounds that the petitioners were entitled to new trials, found it unnecessary to decide Questions 4 and 5 above. Those questions, which relate solely to the petitioners' right to new trials, are here presented only out of abundant caution. They could probably be urged in support of the judgment of the Circuit Court of Appeals in any event, if the writ prayed for by the Government in this case be granted. (*Stelos Co.* v. *Hosiery Motor-Mend Corp. et al.*, 295 U. S. 237, 238-239 (1939).)

The Facts.

Petitioners were convicted in the United States District Court for the Western District of Wisconsin under an in-

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[1] Among the defendants thus granted new trials was Standard Oil Company (Ind.) (R. 2491). The evidence showed that that company was the largest distributor in the indictment territory, and that acting alone it had the power to prevent its competitors from obtaining arbitrary and non-competitive prices for their products (R. 1085, 1244, 1246-7, 1388, 1390-1, 3813).

dictment charging a conspiracy to artificially raise and to fix the tank car spot market price of gasoline in violation of the Sherman Anti-Trust Act. (Act of July 2, 1890, 26 Stat. 209, U. S. C. Title 15, Sec. 1) (R. 2478, 2501) The conspiracy was to be accomplished by petitioners engaging in two so-called buying programs under which they would make purchases of gasoline in the spot market, at "uniformly high, arbitrary, and non-competitive prices, and from time to time at progressively increased prices, as agreed upon". (R. 13-16) Petitioners were then charged with having fraudulently secured the publication in the defendant trade journals of the prices paid by them, under the false representation that they were prices paid by jobbers. (R. 16-17)

It should be noted that the indictment charged that the defendants, in selling to jobbers, usually based their prices upon the spot market quotations in the trade journals. (R. 10) There was neither allegation nor proof that this practice had resulted from any agreement or concert of action among the defendants. Government counsel in their bill of particulars and in statements to the trial court repeatedly disclaimed any intention to charge such an agreement. (R. 56, 66, 296, 2307, 2308)

The Government failed to prove the essential conspiracy allegations. The most it can argue is that there is evidence which might justify the inference that the defendants had agreed to purchase distress gasoline and to pay therefor the fair going market price as competitively established. The price in each transaction was to be determined by individual bargaining between buyer and seller. In fact, the prices actually paid were usually at or below the going market prices and several different prices were often paid on the same day. (R. 1184, 1558-66, 3457-60, 3783, 3807-10) The trade journals, named in the indictment as co-conspirators and charged therein with being the "chief instrumentalities" of the conspiracy, had never either intentionally or unintentionally published the prices which

the defendants paid and represented them to be prices paid by jobbers. (R. 769-81, 791-2, 3783, 3807-10) Upon the Government's own motion the trade journal defendants were dismissed from the case. (R. 902-903)

Twenty-six corporations and 46 individuals were brought to trial. During the trial the case was dismissed against 10 of the corporations and 16 of the individuals. Verdicts of guilty were returned as to all the remaining defendants. Thereafter the District Court dismissed from the case 1 corporation and 10 individuals, and ordered new trials for 3 corporations and 15 individuals, leaving the verdict to stand only as to 12 corporations and 5 individuals. These latter constitute the present petitioners. (R. 73-74, 903, 912, 1149, 1890, 2284, 2351, 2380, 2484, 2490-2491) On appeal the judgments of conviction were reversed and the case was remanded to the District Court for new trials, but one of the judges, in a carefully reasoned separate opinion, held that the Disrict Court lacked jurisdiction because no adequate overt act was alleged in the Indictment or established by the evidence. (R. 3911, 3950)

Specification of Errors.

The Circuit Court of Appeals erred—

1. In sustaining the jurisdiction of the District Court.

2. In holding that there was no fatal variance between the indictment and the proof.

3. In sustaining the action of the District Court in denying defendants' several motions for directed verdicts of not guilty.

4. In failing to rule that the District Court should have granted petitioners' several motions for new trials.

5. In failing to rule that the argument of Government counsel to the jury constituted reversible error.

Reasons Justifying Issuance of the Writ.

1. The division of opinion among the judges of the Circuit Court of Appeals emphasizes both the substance and the importance of the question of jurisdiction. In that situation petitioners should not be required to enter upon a protracted new trial[1] until the question of jurisdiction is authoritatively settled by this Court. In sustaining the jurisdiction of the District Court, the majority opinion of the Circuit Court of Appeals appears to reveal a misapprehension of the decisions of this and other courts defining the nature of an overt act adequate to confer jurisdiction for trial purposes. Such an act must be of a character to evidence the operation of the conspiracy in the place where the act is committed. Such is the plain ruling in *Hyde* v. *United States*, 225 U. S. 347, 365 (1912). The indictment here fails to charge that the conspiracy embraced the taking of contracts from jobbers, and the making of sales to them and others in the Western District of Wisconsin. (R. 12-13) Indeed Government counsel, in the proceedings below affirmatively so declared (R. 56, 66, 296, 2307, 2308). So far as the indictment, the evidence and the declared position of Government counsel are concerned, the taking of contracts and the making of sales were individual acts unaffected by any prior agreement. In brief, what was done in the Western District of Wisconsin was concededly not "the activities of the conspiracy". (*Brown* v. *Elliott*, 225 U. S. 392, 402 (1912).) The individual reaping of an advantage, if any, from an already fully executed conspiracy is merely a remote result and no part of the conspiracy itself. It cannot be made a part of the conspiracy for the purpose of creating jurisdiction merely by designating it as such. (*Rose* v. *St. Clair*, 28 F. (2d) 189, 191 (D. C. Va., 1928); *United States* v. *Black*, 160 Fed. 431,

[1] The trial below commenced on October 4, 1937, and ended with the verdict of the jury on January 22, 1938. (R. 73, 2432)

435-6 (C. C. A. 7th, 1908); *Lonabaugh* v. *United States*, 179 Fed. 476, 481 (C. C. A. 8th, 1910).).

The correctness of our contention is further demonstrated by the construction placed upon the indictment by the Circuit Court of Appeals to support its ruling that the allegation of the indictment charging the use of the trade journals in the publication of the prices paid by the defendants and the fraudulent misrepresentation that such prices were paid by jobbers on the spot market was but the allegation of a means not essential to the carrying out of the conspiracy charged. The court reached that conclusion by indicating that the conspiracy was one to fix and maintain tank car spot market prices, to be effected by purchases under two buying programs conducted in their entirety outside of the Western District of Wisconsin. That done, obviously the conspiracy, because of accomplishment, was at an end, and no mere subsequent sales in the Western District of Wisconsin could aid or execute such conspiracy. The Court below purported to find jurisdiction on the authority of *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927). That decision was clearly inapplicable to the present case for the conspiracy there charged embraced the making of sales at fixed and agreed upon prices. In the case at bar, as we have pointed out, no agreement with respect to sales in the Western District of Wisconsin at any price was either alleged or proved.

2. The only means charged in the indictment for increasing the price to jobbers and others in Western Wisconsin, are the purchase of gasoline by petitioners at "uniform, high, arbitrary and non-competitive prices, and from time to time at progressively increased prices as agreed upon", and the false publication of those prices in the trade journals, which trade journals were named as defendants, but subsequently dismissed from the case for failure of proof. These allegations were essential parts of the offense as alleged, and were, therefore, required to be

proved as laid for they were the only means by which it was alleged that the price to the jobbers and others in Wisconsin had been raised or affected. (*Nash* v. *United States*, 229 U. S. 373, 379, 380 (1913); *United States* v. *Nat'l Malleable and Steel Castings Co.*, 6 F. (2d) 40, 41 (D. C. Ohio, 1924); *United States* v. *American Naval Stores Co.*, 172 Fed. 455, 462-3 (C. C. Ga., 1909); *Patterson* v. *United States*, 222 Fed. 599, 629, 633, 649-50 (C. C. A. 6th, 1915); *United States* v. *Great Western Sugar Co.*, 39 F. (2d) 149, 151 (D. C. Nebr., 1929).)

The failure of proof was, therefore, fatal, for not only did it constitute a complete failure of proof but it left the indictment as merely charging a conspiracy to raise the tank car spot market prices by purchases under two buying programs outside of the Western District of Wisconsin, thus failing to establish the alleged grounds for the jurisdiction of the District Court.

The Circuit Court of Appeals appears to have found itself compelled to adopt this limited interpretation of the indictment in order to reach its conclusion that the allegation describing the use of the trade journals in the publication of fraudulent prices was unessential in the execution of the conspiracy and, therefore, need not be proved. The disposition thus made of this point by the court below strongly emphasizes the inherent merit of our challenge to the jurisdiction of the District Court, for if the tank car spot market price was fixed and maintained by purchases made under the two buying programs, then obviously sales subsequently made in the Western District of Wisconsin pursuant to jobber contracts or otherwise did not in any sense contribute to the execution or success of the conspiracy.

3. The Circuit Court of Appeals, in holding that the trial court did not commit error in denying petitioners' motions for directed verdict, held in effect that there was evidence to go to the jury tending to show that the buying programs as conducted by petitioners unreasonably re-

strained trade and commerce. The court below failed, however, to point to any evidence to sustain that conclusion. It is the contention of petitioners that the record contains no such evidence.

Conclusion.

For the reasons stated, the writ should issue as herein prayed.

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